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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTHONY IMPERIAL,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO,  
Does 1 to 10,

Defendant.

No. C 08-05644 CW

ORDER GRANTING  
DEFENDANT'S MOTION  
TO DISMISS

On December 18, 2008, Plaintiff filed his original complaint. On January 21, 2009, Defendant City and County of San Francisco filed a motion to dismiss. Because Plaintiff did not file a timely opposition the scheduled hearing was vacated and Plaintiff was ordered to file an opposition or an amended complaint. On February 25, 2009, Plaintiff filed an amended complaint. Defendant moves to dismiss Plaintiff's amended complaint under Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes the motion. The matter was taken under submission on the papers. Having considered all of the papers filed by the parties, the Court GRANTS Defendant's motion and dismisses the complaint. Leave to amend is granted as to some of the claims.

BACKGROUND

Plaintiff "does business" as NextArts in the Hunter's Point area of San Francisco. Plaintiff alleges that Defendant engaged in

1 unfair business practices in awarding contracts to businesses in  
2 Hunter's Point and that as a result of reporting this on November  
3 11, 2006, Plaintiff became "the target of police harassment." Am.  
4 Compl. at 1.

5 Plaintiff further alleges that Defendant aided local  
6 businesses "in an effort to end Plaintiff's business career;" that  
7 Defendant supplied "incorrect and improper information regarding  
8 Plaintiff" resulting in the issuance of a restraining order against  
9 him; that, during a hearing on the restraining order, Defendant  
10 "supplied information regarding a past conviction that was sealed  
11 by the court and was unrelated to any alleged present behavior by  
12 Plaintiff;" and that Defendant harassed Plaintiff despite knowledge  
13 that he is disabled. Am. Compl. at 3. Based on these allegations,  
14 Plaintiff attempts to state claims under 42 U.S.C. § 1983 against  
15 Defendant for violations of the Fourteenth Amendment's Due Process  
16 and Equal Protection Clause, and "other applicable State of  
17 California and Federal laws." Am. Compl. at 2.

## LEGAL STANDARD

19 A complaint must contain a "short and plain statement of the  
20 claim showing that the pleader is entitled to relief." Fed. R.  
21 Civ. P. 8(a). When considering a motion to dismiss under Rule  
22 12(b)(6) for failure to state a claim, dismissal is appropriate  
23 only when the complaint does not give the defendant fair notice of  
24 a legally cognizable claim and the grounds on which it rests. Bell  
25 Atl. Corp. v. Twombly, 550 U.S. 544, 554-55 (2007). The Supreme  
26 Court has specifically declared that "a federal court may not apply  
27 a heightened pleading standard to a complaint alleging municipal  
28 liability under § 1983." Branch v. Tunnell, 14 F.3d 449, 450 (9th

1 Cir. 1994) (citing Leatherman v. Tarrant County Narcotics  
2 Intelligence and Coordination, 507 U.S. 163, 168 (1993)).

3 In considering whether the complaint is sufficient to state a  
4 claim, the court will take all material allegations as true and  
5 construe them in the light most favorable to the plaintiff. NL  
6 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
7 Although the court is generally confined to consideration of the  
8 allegations in the pleadings, when the complaint is accompanied by  
9 attached documents, such documents are deemed part of the complaint  
10 and may be considered in evaluating the merits of a Rule 12(b)(6)  
11 motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th  
12 Cir. 1987).

13 When granting a motion to dismiss, the court is generally  
14 required to grant the plaintiff leave to amend, even if no request  
15 to amend the pleading was made, unless amendment would be futile.  
16 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
17 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
18 would be futile, the court examines whether the complaint could be  
19 amended to cure the defect requiring dismissal "without  
20 contradicting any of the allegations of [the] original complaint."  
21 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).  
22 Leave to amend should be liberally granted, but an amended  
23 complaint cannot allege facts inconsistent with the challenged  
24 pleading. Id. at 296-97.

25 DISCUSSION

26 I. Stating a Claim Under 42 U.S.C. § 1983

27 Section 1983 "provides a cause of action for the 'deprivation  
28 of any rights, privileges, or immunities secured by the

1 Constitution and laws' of the United States." Wilder v. Virginia  
2 Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).  
3 Section 1983 is not itself a source of substantive rights, but  
4 merely provides a method for vindicating federal rights elsewhere  
5 conferred. Graham v. Connor, 490 U.S. 386, 393-94 (1989). To  
6 state a claim under section 1983, a plaintiff must allege two  
7 essential elements: (1) that a right secured by the Constitution or  
8 laws of the United States was violated and (2) that the alleged  
9 violation was committed by a person acting under the color of state  
10 law. West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda  
11 County, 811 F.2d 1243, 1245 (9th Cir. 1987).

12 Liability may be imposed on an individual defendant under  
13 section 1983 if the plaintiff can show that the defendant  
14 proximately caused the deprivation of a federally protected right.  
15 Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City  
16 of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person  
17 deprives another of a constitutional right within the meaning of  
18 section 1983 if he or she does an affirmative act, participates in  
19 another's affirmative act or omits to perform an act which he or  
20 she is legally required to do, that causes the deprivation of which  
21 the plaintiff complains. Leer, 844 F.2d at 633. The inquiry into  
22 causation must be individualized and focus on the duties and  
23 responsibilities of each individual defendant whose acts or  
24 omissions are alleged to have caused a constitutional deprivation.  
25 Leer, 844 F.2d at 633.

26 Local governments are "persons" subject to liability under  
27 § 1983 only where an official policy or custom causes a  
28 constitutional tort. See Monell v. Dep't of Social Servs., 436

1 U.S. 658, 690 (1978). They may not be held vicariously liable for  
2 the unconstitutional acts of their employees under the theory of  
3 respondeat superior. See Board of County Comm'rs v. Brown, 520  
4 U.S. 397, 403 (1997); Monell, 436 U.S. at 691; Fuller v. City of  
5 Oakland, 47 F.3d 1522, 1534 (9th Cir. 1995). Rather, to impose  
6 municipal liability under § 1983 for a violation of constitutional  
7 rights, a plaintiff must show: (1) that the plaintiff possessed a  
8 constitutional right of which he or she was deprived; (2) that the  
9 municipality had a policy; (3) that this policy amounts to  
10 deliberate indifference to the plaintiff's constitutional rights;  
11 and (4) that the policy is the moving force behind the  
12 constitutional violation. See Plumeau v. School Dist. #40 County  
13 of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997). Liability based on  
14 a municipal policy may be satisfied one of three ways:

15 (1) by alleging and showing that a city or county employee  
16 committed the alleged constitutional violation under a formal  
17 governmental policy or longstanding practice or custom that is  
the customary operating procedure of the local government  
entity,

18 (2) by establishing that the individual who committed the  
19 constitutional tort was an official with final policymaking  
20 authority and that the challenged action itself was an act of  
official governmental policy which was the result of a  
deliberate choice made from among various alternatives, or

21 (3) by proving that an official with final policymaking  
22 authority either delegated policymaking authority to a  
subordinate or ratified a subordinate's unconstitutional  
decision or action and the basis for it.

23 See Fuller, 47 F.3d at 1534; Gillette v. Delmore, 979 F.2d 1342,  
24 1346-47 (9th Cir. 1992). A local government may also be liable for  
25 constitutional violations resulting from its failure to supervise,  
26 monitor or train, but only where the inadequacy of said  
27 supervision, monitoring or training amounts to deliberate  
28

1 indifference to the rights of the people with whom the local  
2 government comes into contact. See City of Canton v. Harris, 489  
3 U.S. 378, 388 (1989); Van Ort v. Estate of Stanewich, 92 F.3d 831,  
4 835 (9th Cir. 1996); Mackinney v. Nielsen, 69 F.3d 1002, 1010 (9th  
5 Cir. 1995); Davis v. City of Ellensburg, 869 F.2d 1230, 1235 (9th  
6 Cir. 1989).

7 In his amended complaint, Plaintiff fails to name any  
8 individual defendant acting under color of state law or even to  
9 describe a specific state actor whose name is unknown.  
10 Furthermore, Plaintiff may only sue the City and County of San  
11 Francisco if he can meet the requirements set forth under Monell,  
12 which also requires that Plaintiff allege what specific individual  
13 actors did. Plaintiff alleges no basis for imposing liability on a  
14 municipal Defendant. Therefore, all claims against Defendant must  
15 be dismissed on this ground alone. Plaintiff is granted leave to  
16 amend to remedy this deficiency, if he truthfully can do so.

17 If Plaintiff reasserts his section 1983 claims in an amended  
18 complaint he must also remedy his claim under the Due Process  
19 Clause of the Fourteenth Amendment, as discussed below.

20 A. Equal Protection Claim

21 Defendant argues that Plaintiff fails to show that any  
22 municipal actor acted with the intent or purpose to discriminate  
23 against him as a member of a protected class because he fails to  
24 allege that his disability was a motivating factor for his alleged  
25 mistreatment. Defendant states that whistleblowers are not a  
26 protected class. Alternatively, Defendant argues that Plaintiff  
27 has failed to allege that whistleblowers as a class are treated  
28 differently than non-whistleblowers. Plaintiff does not respond to

1 the argument.

2 "The Equal Protection Clause of the Fourteenth Amendment  
3 commands that no State shall 'deny to any person within its  
4 jurisdiction the equal protection of the laws,' which is  
5 essentially a direction that all persons similarly situated should  
6 be treated alike." City of Cleburne v. Cleburne Living Ctr., 473  
7 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216  
8 (1982)). "To state a claim under 42 U.S.C. § 1983 for a violation  
9 of the Equal Protection Clause of the Fourteenth Amendment a  
10 plaintiff must show that the defendants acted with an intent or  
11 purpose to discriminate against the plaintiff based upon membership  
12 in a protected class." Barren v. Harrington, 152 F.3d 1193, 1194  
13 (9th Cir. 1998), cert. denied, 525 U.S. 1154 (1999). To state a  
14 claim for relief, the plaintiff must allege that the defendant  
15 acted, at least in part, because of the plaintiff's membership in a  
16 protected class. Serrano v. Francis, 345 F.3d 1071, 1081-82 (9th  
17 Cir. 2003). "The disabled do not constitute a suspect class." Lee  
18 v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001); see City  
19 of Cleburne, 473 U.S. at 440. Plaintiff's disability does not put  
20 him in a protected class.

21 Plaintiff does not allege that whistleblowers constitute a  
22 protected class nor does he cite to any authority that  
23 whistleblowers are a protected class under Fourteenth Amendment and  
24 the Court is unaware of none. Plaintiff's amended complaint  
25 therefore fails to raise a cognizable claim under the Fourteenth  
26 Amendment.

27 In its motion to dismiss Plaintiff's original complaint,  
28 Defendant argued that Plaintiff's claims under the Fourteenth

1 Amendment were deficient because Plaintiff failed to allege that he  
2 was a member of a protected class. Rather than oppose this motion,  
3 Plaintiff filed an amended complaint and thus had an opportunity to  
4 correct this. Because Plaintiff's amended complaint contains the  
5 same deficiency, his claim under the Fourteenth Amendment is  
6 dismissed without leave to amend.

7       B. Due Process Claim

8       With respect to Plaintiff's allegation that Defendant "aided  
9 local businesses . . . harassing Plaintiff in an effort to end  
10 Plaintiff's business career," Defendant argues that losing some  
11 business does not implicate a valid property interest under the Due  
12 Process Clause and that Plaintiff fails to allege that Defendant  
13 caused him to lose his business altogether.       The Due Process  
14 Clause of the Fourteenth Amendment protects individuals against  
15 governmental deprivations of "life, liberty or property" without  
16 due process of law. Board of Regents v. Roth, 408 U.S. 564, 570-71  
17 (1972); Mullins v. Oregon, 57 F.3d 789, 795 (9th Cir. 1995). To  
18 state a claim under the Due Process Clause a plaintiff must allege  
19 that the government has deprived him of life, liberty or property,  
20 Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976), and that the  
21 government deprived him of these constitutionally-protected  
22 interests without due process of law. Id.

23       "The assets of a business (including its good will)  
24 unquestionably are property, and any state taking of those assets  
25 is unquestionably a 'deprivation' under the Fourteenth Amendment."  
26 College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 674 (1999).

27       Plaintiff does not clearly allege that municipal actors'

1 conduct amounted to a deprivation of his entire business, or, if  
2 so, how. Nor does he allege the type of process to which he  
3 believes he is due. The Court dismisses Plaintiff's due process  
4 claim with leave to amend to make these allegations, if he can  
5 truthfully do so.

6 II. State Law Claims

7 A. Federal Rule of Civil Procedure 8(a)

8 Defendant argues that Plaintiff fails to allege any specific  
9 state law claim. Plaintiff's vague assertion that his claim arises  
10 under "other applicable State of California . . . laws" is not  
11 sufficient to state a claim under Federal Rule of Civil Procedure  
12 8(a). Plaintiff must specify the exact state law violation which  
13 he intends to claim. Plaintiff's state law claims are, therefore,  
14 dismissed. The Court grants leave to amend these claims, if they  
15 can be amended in compliance with the statute of limitations, as  
16 discussed below.

17 B. Statute of Limitations

18 Defendant argues that Plaintiff's state law claims should be  
19 dismissed without leave to amend because he did not file his  
20 lawsuit timely after exhausting his administrative remedies.

21 California law requires that a plaintiff suing a public entity  
22 first seek relief in the City Controller's Office. Cal. Gov't Code  
23 § 945.4. If the relief is denied, the plaintiff may file a lawsuit  
24 within six months of that denial. Cal. Gov't Code § 945.6(a)(1).  
25 Failure to file within six months may result in summary judgment  
26 for the defendant. Gonzales v. County of Los Angeles, 199 Cal.  
27 App. 3d 601, 605 (1988). The six month statute of limitations  
28 applies to actions in federal court. See Estate of Darulis v.

1 Garate, 401 F.3d 1060, 1062 (9th Cir. 2005).

2 The purpose of the statute is to insure that claims are not  
3 stale and evidence is available. DeLeon v. Bay Area Rapid Transit  
4 Dist., 33 Cal.3d 456, 459 (1983); Addison v. State of California,  
5 21 Cal.3d 313, 317 (1978). However, there is a strong public  
6 policy favoring disposition of litigation on the merits wherever  
7 possible, rather than on procedural grounds. Barrington v. A. H.  
8 Robins Co., 39 Cal.3d 146, 152 (1985).

9 On February 1, 2007, Plaintiff filed his first claim with the  
10 City Controller's Office alleging "Wrongful Eviction, Violation of  
11 Civil Rights (Whistleblower Statutes), Police Harassment and  
12 Misconduct." Dec. of Joshua S. White, Exhibit C. On August 3,  
13 2007, Plaintiff's claim was denied. This complaint was filed on  
14 February 25, 2009, more than six months after August 3, 2007, so it  
15 is barred by the statute of limitations. Plaintiff argues that  
16 this claim was moot because he was evicted. This argument is  
17 unavailing. Any putative state law claims Plaintiff brings for  
18 "Wrongful Eviction, Violation of Civil Rights (Whistleblower  
19 Statutes), Police Harassment and Misconduct" are dismissed without  
20 leave to amend.

21 On September 1, 2008, Plaintiff filed a second claim with the  
22 City Controller's Office against the San Francisco Police  
23 Department alleging that officers "caused Claimant severe emotional  
24 distress and deprived him of his civil rights." Neither party  
25 alleges the date of the City Controller's Office decision.  
26 Nevertheless, Plaintiff's first and second claims are based on the  
27 same facts and circumstances; in both claims Plaintiff alleges that  
28 he was harassed by police officers because of his report regarding

1 the allocation of contracts to businesses in Hunter's Point.  
2 Because both claims are based on the same incidents, Plaintiff's  
3 second claim does not restart the statute of limitations. Thus,  
4 any of Plaintiff's causes of action that depend on these  
5 administrative claims to satisfy the exhaustion requirement are  
6 time-barred. The Court, therefore, dismisses Plaintiff's state law  
7 claims with leave to amend to allege only specific state law claims  
8 that have been exhausted and are not time-barred.

9 **III. Punitive Damages**

10 Defendant argues that Plaintiff's claim for punitive damages  
11 must be dismissed because Plaintiff may not recover such damages  
12 against it under either state or federal law. Plaintiff's  
13 opposition fails to address this argument.

14 The Supreme Court has held that a municipality is immune from  
15 punitive damages under § 1983. City of Newport v. Fact Concerts,  
16 Inc., 453 U.S. 247, 271 (1981). Generally, under California law,  
17 public entities are not liable for punitive damages. See Cal.  
18 Gov't Code § 818.

19 Plaintiff's federal claims arise under § 1983 and, therefore,  
20 he may not seek punitive damage for his federal claims. Plaintiff  
21 also may not seek punitive damages against the City and County of  
22 San Francisco for any state law claim. A public employee, however,  
23 may be held liable for punitive damages. Runyon v. Superior Court,  
24 187 Cal.3d 878, 232 (1986). Under California law, punitive damages  
25 are available upon a showing that the defendant acted with  
26 "oppression, fraud, or malice." Cal. Civ. Code § 3294. If  
27 Plaintiff is able to amend his complaint to state a claim under  
28 California law against a named public employee, he may seek

1 punitive damages against that employee if he is truthfully able to  
2 allege oppression, fraud, or malice.

3 CONCLUSION

4 The Court GRANTS Defendant's motion to dismiss Plaintiff's  
5 amended complaint. Plaintiff's claims under § 1983 are dismissed.  
6 Plaintiff's Equal Protection claim under § 1983 and request for  
7 punitive damages on his § 1983 claims are dismissed without leave  
8 to amend. Plaintiff's Due Process claim under § 1983 and state law  
9 claims are dismissed with leave to amend. Plaintiff may file and  
10 serve a second amended complaint within twenty (20) days of this  
11 order. If Plaintiff fails to file a second amended complaint  
12 during this time, his complaint will be dismissed for failure to  
13 prosecute.

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15 IT IS SO ORDERED.

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17 Dated:

18 CLAUDIA WILKEN  
United States District Judge

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